pleading and discovery deadlines until the Commission rules on all such motions, defendants would be able to hold proceedings hostage simply by filing certain motions, regardless of whether they are justified by the facts or law. For reasons of economy, we have typically resolved most substantive motions in our final order deciding the merits of a case. However, we have, in the past, altered normal procedures and extended deadlines when a complaint presents significant threshold issues which merit early resolution. But any requirement for separate resolution of individual motions imposes unnecessary and unreasonable constraints on this Commission, especially given the questionable validity of many motions currently filed.

64. Ameritech and WTG propose that parties should be able to obtain admissions of fact as a standard part of the complaint process. They suggest that such admissions are an efficient means of narrowing areas of controversy and are less burdensome than interrogatories as a means of establishing facts. We agree with the parties opposing this proposal, that it is unnecessary and simply adds another area of dispute and layer of delay.[63] Current pleading requirements already provide for an equivalent means of establishing facts. In answering a complaint, a defendant must admit or deny the averments set forth in the complaint or specifically state that it does not have the knowledge or information necessary to form a belief as to the truth of the averment. See 47 C.F.R. § 1.724(c). In addition to the ability to develop a factual record through the normal pleading process, our rules explicitly state that the need for obtaining admissions of fact can be addressed in status conferences. 47 C.F.R. § 1.732(a)(3). Any parties believing that such admissions would be beneficial in a particular case can request a status conference to address the matter or move for leave to request admissions from an opposing party. Given our clear authority to require admissions of fact when desirable and the ability to obtain generally equivalent declarations through the normal pleading process, the inclusion of such admissions as a routine element in the formal complaint process is unnecessary.

65. Some parties believe that Administrative Law Judges (ALJs) should be used to a greater degree in formal complaint cases.[64] Various options are suggested, ranging from appointing ALJs to oversee all discovery to designating all cases with any factual dispute for evidentiary hearing before an ALJ. One party contends that such designation is mandatory under the APA.[65] In the NPRM, we recognized our authority to order evidentiary hearings in formal complaint cases. NPRM, 7 FCC Rcd 2042, 2045 n. 10. We do not believe that a new rule need be adopted to set particular guidelines for

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63 Reply Comments of Allnet at 4; Reply Comments of Pacific Companies at 3.

64 Comments of Ameritech at 5, 7-8; Reply Comments of Ameritech at 4; Reply Comments of NATA at 5; Comments of Pacific Companies at 7-8. But see Reply Comments of BellSouth at 3 n. 6 (does not object to use of ALJs but observes that under Ameritech's standards for referral, "virtually all" complaints would go to ALJs).

65 Comments of Ameritech at 5.

ALJ involvement in formal complaint cases. Nor do we believe, as is suggested without citation or explanation, that designation to an ALJ is mandatory in every case with any factual dispute. Although formal hearings under the APA are a statutory requirement in certain types of actions,[66] there is no such requirement for formal hearings in formal complaint cases. In fact, Section 208 of the Communications Act specifically confers upon the Commission authority to handle complaints "in any manner and by such means as it shall deem proper." 47 U.S.C. § 208. Under this authority, the Commission has developed procedures for the disposition of complaints principally upon a paper record. In addition, while Section 209 requires a "hearing" in complaint cases awarding damages, it does not require that such a hearing be on the record after opportunity for hearing, i.e., be an adjudicatory hearing under the APA.[67] Accordingly, it has been our practice to designate formal complaints for hearing before an ALJ only when oral testimony or cross-examination is required. 1988 Formal Complaint Rules Revision, 3 FCC Rcd at 1810.

66. U S West contends that the Commission should freely exercise authority to dismiss all frivolous complaints at the earliest possible time. SWBT, supported by USTA, urges adoption of a rule requiring the immediate dismissal of complaints that allege unreasonably high rates or overearnings when the rates and sharing mechanisms at issue are in compliance with relevant price cap requirements. We agree with WTG that this specific proposal is outside the scope of this proceeding. The formal complaint rules, and our inquiry here, are designed to provide a general framework for the procedures to be followed in handling a wide range of complaints against common carriers, not to set requirements applicable only to a narrow set of disputes.

67. With respect to dismissal of complaints generally, our rules already require that a formal complaint must clearly state facts which, if true, constitute a violation of the Communications Act or an order, rule or policy of the Commission and cite the particular provision which allegedly has been violated. See 47 C.F.R. § 1.721(a)(4). The facts should be presented with sufficient explanation and in a manner calculated to clearly advise the Commission and the defendant of the claims being made. 47 C.F.R. § 1.720. More stringent enforcement of these requirements could result in increased dismissals, and we hereby instruct the staff to pay particular attention to such matters in reviewing incoming complaints. However, while some complaints may not be as thoroughly pleaded as we would prefer, most complaints filed with the Commission meet the minimal standards of our rules.

68. We are concerned, however, that in some instances complaints are being lodged with the Commission before the complainant has established the essential facts underlying the action. Specifically, we have discovered a significant number of cases where complainants have sought to recover

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66 E.g., 47 U.S.C. § 312(c) (revocation of radio license or permit).

67 We note that written procedures before the Commission may satisfy the APA hearing requirements. See 5 U.S.C. § 556(d).

damages for violations related to the provision of service when, in fact, they never took such service from the defendants.[68] We are unable to summarily dismiss such complaints when they are received since without further pleadings we would have no way of discovering that there is no factual basis for the complaint. Thus, both our resources and those of the defendants must be unnecessarily expended to address a totally baseless claim. Such actions abuse our process and contribute to overall delays in formal complaint resolution. Lawyers who do not confirm the veracity of assertions made in a complaint or responsive pleadings risk possible sanctions including censure, suspension or disbarment from Commission practice. See 47 C.F.R. § 1.24.

69. Some parties urge that the formal complaint rules be amended to provide for sanctions against uncooperative or abusive parties.[69] Although the desired range of sanctions are not specified by all parties, some urge the Commission to adopt provisions modeled after Rules 11 and 37(a)(4) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 11, 37(a)(4). Some parties also suggest that attorneys fees should be awarded to prevailing parties, or else an unfair discrepancy exists in the relief that can be obtained, based solely on whether a complainant chooses to bring a claim before the Commission or a federal district court. Although we wish to discourage improper practices by attorneys in formal complaint proceedings, we do not believe that this can be best accomplished through specific sanctions applicable to the formal complaint process. We agree with BellSouth and SWBT that specific sanction rules would inevitably inject new and major controversies to the formal complaint process. It has been our experience that charges of frivolous or abusive practice can be without merit and, in fact, sometimes are themselves interposed for frivolous or abusive purposes. We fear that specific sanction rules would only encourage such charges and require our involvement in disputes that will prolong ultimate resolution of the underlying complaint. We believe that inclusion of specific sanctions applicable only in the formal complaint context is unnecessary given our broad sanction authority under existing rules.[70] The fact that there is no provision in the formal complaint rules for the recovery of attorneys fees is but only one of several significant differences between the forums available for resolution.[71] Parties are free to weigh the

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68 See e.g., LDDS Communications, Inc. v. Contel of Arkansas et al., File Nos. E-90-236 - E-90-244, 7 FCC Rcd 4212 (Com.Car.Bur. 1992); LDDS Communications, Inc. v. Carolina Telephone and Telegraph Co. et al., File Nos. E-90-248 - E-90-253, 7 FCC Rcd 4296 (Com.Car.Bur. 1992); NTS v. GTE Southwest, Inc., File No. E-91-055, 7 FCC Rcd 1988 (Com.Car.Bur. 1992).

69 Comments of Ameritech at 9; Comments of United Video et al. at 16-18; Comments of WTG at 4-5.

70 47 C.F.R. § 1.24.

71 We also note we lack authority to require the payment of attorneys fees. See Turner v. FCC, 514 F.2d 1354 (1975).

advantages in bringing their claims in federal district court against the benefits of Commission resolution. See 47 U.S.C. § 207.

70. U S West, supported by other commenters,[72] suggests that we add to the formal complaint rules a provision modeled after the federal pre-trial procedures contained in Rule 16 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 16. Under U S West's plan, an early conference would be held to discuss issues in dispute, the need for discovery and briefing, and anticipated motions. At the conference, the staff would set a schedule for procedural actions individually tailored to the particular complexities of the individual complaint. The Commission already has a rule designed to encompass many of the functions covered by Rule 16. Section 1.732 of our rules was clearly modeled after Rule 16, but adapted to the formal complaint context where trials are not held. Further, although we support the increased use of status conferences for defining issues and resolving interlocutory matters, we believe that it would be burdensome for the staff to have to set separate procedural schedules for each complaint. We believe that the objectives sought by U S West can be realized under our existing rules, as amended here.

IV. CONCLUSION

71. With this Report and Order, we adopt rules designed to improve the records compiled in formal complaint cases and expedite resolution of such cases. Specifically, we are adopting rules which should ensure the confidentiality of materials exchanged through discovery. We have both established an absolute right to file briefs and set uniform standards applicable to such pleadings. We have also discontinued certain unnecessary pleadings and authorized the staff to issue oral rulings on interlocutory matters.

V. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201(b), 208 and 403 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), 208 and 403, that Section 1.720 et seq. of the Commission's rules, 47 C.F.R. § 1.720 et seq. IS AMENDED as set forth in Appendix B.

73. IT IS FURTHER ORDERED that this Report and Order will be effective ninety (90) days after publication of a summary thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

72 Reply Comments of Pacific Companies at 2; Reply Comments of United Video et al. at 3 n. 2.

APPENDIX B

RULES ADOPTED

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 1 - Practice and procedure

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. In § 1.720, paragraph (i) is added to read as follows:

§ 1.720 General pleading requirements.
* * * * *

(i) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

3. In § 1.724, paragraph (e) is added to read as follows;

§ 1.724 Answers.
* * * * *

(e) Affirmative defenses to allegations contained in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (c) of this section.

4. Section 1.726 is revised to read as follows:

§ 1.726 Replies.

Within 10 days after service of an answer containing affirmative defenses presented in accordance with Section 1.724(e), a complainant may file and serve a reply, which shall be responsive to only those allegations contained in affirmative defenses.

5. In § 1.727, paragraph (e) is revised to read as follows and paragraph (f) is added to read as follows:

§ 1.727 Motions.
* * * * *

(e) Oppositions to motions may be filed within ten days after the motion is filed. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a

complaint, an opposition to the motion shall not address any issues presented in the answer that are not also specifically raised in the motion.

(f) No reply may be filed to an opposition to a motion.

6. In § 1.729, paragraphs (a) and (d) are revised, the last sentence of paragraph (c) is revised, and new paragraph (e) is added to read as follows:

§ 1.729 Interrogatories to parties.

(a) During the time period beginning with service of the complaint and ending 30 days after the date an answer is due to be filed, any party may serve any other party written interrogatories, to be answered in writing by the party served or, if the party served is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. All interrogatories served on an opposing party shall be filed with the Commission at the time of service. Parties shall propound no more than 30 single interrogatories without prior Commission approval. Subparts of an interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. This procedure may be used for the discovery of any nonprivileged matter which is relevant to the pleadings. Interrogatories may not be employed for the purpose of delay, harassment or to obtain information which is beyond the scope of permissible inquiry relating to the subject matter of the pleadings.

* * * * *

(c) * * * Alternately, the party may request that answers to interrogatories be discussed during a status conference, pursuant to § 1.733.

(d) Answers to interrogatories shall not be filed with the Commission unless so ordered by the Commission or its staff.

(e) The Commission may in its discretion limit the scope of permissible inquiry so that matters pertaining solely to the amount or computation of damages are not addressed until after a finding of liability has been made against the complainant. Inquiries that relate dually to liability and damages will be permitted during initial discovery conducted during the liability phase. If a bifurcated framework is implemented and a finding of liability is made, the parties shall, within 5 working days, inform the Commission whether they wish to defer damages discovery in order to enter negotiations for the purpose of settling their dispute. If the parties commence settlement negotiations, damages discovery shall not be undertaken prior to 20 days after release of the liability order.

7. In § 1.730, paragraph (c) is revised and paragraph (d) is added to read as follows:

APPENDIX A
List of Commenters in CC Docket No. 92-26

Comments

1. American Telephone and Telegraph Company (AT&T)
2. Ameritech Operating Companies (Ameritech)
3. Allnet Communication Services, Inc. (Allnet)
4. BellSouth Corporation and BellSouth Telecommunication, Inc. (BellSouth)
5. Bell Atlantic Telephone Companies (Bell Atlantic)
6. Central Telephone Company (Centel)
7. Continental Mobile Telephone Company, Inc. (Continental)
8. Federal Communications Bar Association (FCBA)
9. GTE Service Corporation (GTE)
10. Michael J. Hirrel (Hirrel)
11. MCI Telecommunications Corporation (MCI)
12. The North American Telecommunications Association (NATA)
13. NYNEX Telephone Companies (NYNEX)
14. Pacific Bell and Nevada Bell (Pacific Companies)
15. The Public Service Commission of the District of Columbia (DC PSC)
16. Southwestern Bell Telephone Company (SWBT)
17. Sprint Communications Company L.P. (Sprint)
18. U S West Communications, Inc. (U S West)
19. United Video, Inc.; Superstar Connection; Southern Satellite Systems, Inc.; Netlink USA; Eastern Microwave, Inc. (United Video et al.)
20. Williams Telecommunications Group, Inc. (WTG)

Reply Comments

1. Ameritech
2. Allnet
3. BellSouth
4. MCI
5. NATA
6. Pacific Companies
7. SWBT
8. Sprint
9. United States Telephone Association (USTA)
10. United Video et al.
11. WTG

§ 1.730 Other forms of discovery.
* * * * *

(c) Motions seeking discovery may be filed only during the period beginning with the service of a complaint and ending 30 days after the date an answer is filed or 15 days after responses to interrogatories under § 1.729 are filed, whichever period is longer, except where the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within this period.

(d) Documents produced through discovery shall not be filed with the Commission unless so ordered by the Commission or its staff.

8. Sections 1.731 through 1.734 are redesignated as §§ 1.732 through 1.735 and new § 1.731 is added to read as follows:

§ 1.731 Confidentiality of information produced through discovery.

(a) Any materials generated or provided by a party in response to discovery may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(1) - (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(b) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such

information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(c) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(d) Upon termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

9. In newly redesignated § 1.732, the last sentence of paragraph (a) is added; paragraph (b) is redesignated and republished as paragraph (g); and new paragraphs (b), (c), (d), (e), and (f) are added to read as follows:

§ 1.732 Other required written submissions.

(a) * * * Absent an order by the Commission that briefs be filed, the parties may voluntarily submit briefs in accordance with the provisions of paragraphs (b) - (e) of this section.

(b) In cases when discovery is not conducted, briefs shall be filed concurrently by both complainant and defendant within 90 days from the date a complaint is served. Such briefs shall be no longer than 35 pages.

(c) In cases when discovery is conducted, briefs shall be filed concurrently by both complainant and defendant at such time designated by the staff, typically within 30 days after discovery is completed. Such briefs shall be no longer than 50 pages.

(d) Reply briefs may be submitted by either party within 20 days from the date initial briefs are due. Reply briefs shall be no longer than 20 pages in cases when discovery is not conducted, and 30 pages in cases when discovery is conducted.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 1.731 shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall also be filed with the Commission for inclusion in the public file. Edited versions shall be filed within five days from the date the unedited brief is submitted and served on opposing parties.

(f) Either on its own motion or upon proper motion by a party, the Commission may establish other deadlines or page limits for briefs.

(g) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

10. In newly redesignated § 1.733, paragraph (a) introductory text is republished; paragraphs (a)(5) and (b) are revised; paragraphs (c) and (d) are redesignated as paragraphs (d) and (e), respectively; and new paragraph (c) is added to read as follows:

§ 1.733 Status conference.

(a) In any complaint proceeding, the Commission may in its discretion direct the attorneys and/or the parties to appear before it for a conference to consider:
* * * * *

(5) The necessity and extent of discovery, including objections to interrogatories or requests for production of documents;
* * * * *

(b) While a conference normally will be scheduled after the answer has been filed, any party may request that a conference be held at any time after the complaint has been filed.

(c) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of a formal complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to undertake affirmative action not subject to deadlines established by another provision of this subpart, such action will be required within 10 days from the date of the written memorialization unless the staff designates a later deadline.
* * * * *

11. In newly redesignated § 1.735, paragraph (b) is revised to read as follows:

§ 1.735 Copies; service; separate filings against multiple defendants.
* * * * *

(b) The complainant must file an original plus three copies of the complaint, accompanied by the correct fee, in accordance with Subpart G of this Part of the Rules. See 47 C.F.R. § 1.1105(1)(c). However, if a complaint is addressed against multiple defendants, complainant shall pay separate fee

and supply three additional copies of the complaint for each additional defendant.

* * * * *